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No. 92-28

Supreme Court, U.S.
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Supreme Court of the United States

October Term, 1992

STEVEN BROSTOFF,

Petitioner,

- against -

HON. CAROL BERKMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Petitioner Steven Brostoff submits this brief in reply to respondent's brief in opposition to his petition for a writ of certiorari. In section A, *infra*, petitioner demonstrates that this case does provide an opportunity to resolve important issues which this Court was unable to reach in *United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988). In section B, *infra*, petitioner shows that the New York State Court of Appeals did indeed flout this Court's precedents on the due process right to an impartial tribunal.

ARGUMENT

A

Vanquishing a strawman, respondent rebuts the "curious position" she somehow manages to impute to petitioner: that "this case provides an opportunity to resolve the conflicting principles of collateral bar and prior restraint .... " Respondent's Brief at 6. But of course petitioner never touted a First Amendment issue. Rather, petitioner raises the issue of whether exceptions should be recognized to the already capacious if not limitless power of judges to employ the criminal contempt power to exact compliance with decrees without their constitutional validity being examined. And that issue is a significant one, worthy of review by this Court, regardless of whether the decree tramples on the First Amendment or instead on the due process right to be free of arbitrary and capricious exercises of official authority. Thus, even if petitioner's due process challenge to respondent's "[g]et out of the well" order is somehow less important than the First Amendment challenge raised in *Providence Journal Co.*, granting certiorari in this case will permit this Court at last to determine what it was unable to resolve in *Providence Journal Co.*: whether to recognize the exceptions to the collateral bar rule suggested in *Walker* v. *City of Birmingham*, 388 U.S. 307, 315 (1967).

Pummelling another strawman, respondent stresses the inherent power of a court "to regulate its activities to preserve order and decorum," and then professes to be puzzled "how a judge's direction to an attorney to depart from the well of her courtroom could be construed as transparently invalid." Respondent's Brief at 7. Petitioner, however, neither questions the power of a court to control order and decorum nor asserts that respondent's order was "transparently invalid." His claim is that respondent's order had but a "frivolous pretense to validity" precisely because it was but scantily clad in the trappings of a public purpose. That is, petitioner's claim has always been that respondent

was not at all concerned with maintaining order and decorum in the courtroom, but issued her unprecedented command singling him out for special treatment to indulge her abiding rancor toward him and the office he represents.[1]

In short, the issue is whether the Court of Appeals could properly preclude petitioner from challenging respondent's order as a gross abuse of official power for private purposes. And, contrary to respondent's astonishing contentions (Respondent's Brief at 7-9), the Court of Appeals unquestionably did rely upon the collateral bar rule to preclude consideration of the merits of petitioner's claim that respondent's "[g]et out of the well" order was unlawful. In its opinion, the court wrote as follows:

> As this Court has noted in the past," [h]owever misguided and erroneous the court's order may have been, petitioner was not free to disregard it and decide for himself the manner in which to proceed" (*Matter of Balter* v. *Regan*, 63 N.Y.2d 630, 631). App. 2.

Thus, although the court did not use the term "collateral bar rule," it plainly viewed as irrelevant petitioner's claim that the order was the arbitrary and capricious product of respondent's personal antipathy.

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[1]Among respondent's most shameless distortions of the record are her assertion that "parties having business in the court ordinarily do not enter the well until their case is called" (Respondent's Brief at 2) and her suggestion that petitioner may have committed some disruption in the well before she issued her command that he get out of the well (*id.* at 10 n.7). The factual allegations of the verified petition are squarely to the contrary (App. 21-22, 36-37, 40-41, 45) and, as discussed *infra*, the truth of those allegations must be assumed. Respondent's need to fabricate facts tellingly exposes the indefensibility of her attempt to clothe her command with a public purpose.

Any conceivable doubt on this score is dispelled by the court's citation to its decision in *Matter of Balter* v. *Regan*, 63 N.Y.2d 630, 479 N.Y.S.2d 506, 468 N.E.2d 688, *cert. denied*, 469 U.S. 934 (1984). There, the court similarly deemed irrelevant a constitutional challenge to the order disobeyed. In so doing the court cited (63 N.Y.2d at 631, 479 N.Y.S.2d at 507, 468 N.E.2d at 699) the discussion beginning on page 458 of this Court's decision in *Maness* v. *Meyers*, 419 U.S. 449 (1975). And in *Maness*, albeit without employing the phrase "collateral bar rule," this Court made reference to the crux of that rule: "The orderly and expeditious administration of justice by the courts requires that 'an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings.'" 419 U.S. at 459 (*quoting United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947)).[2]

Wholly apart from the Court of Appeals' plain reliance on the collateral bar rule, it is clear for other reasons that the court did not, as respondent claims (Respondent's Brief at 7-9), consider and reject on the merits petitioner's challenge to the validity of her "[g]et out of the well" order. First, nothing in the court's terse memorandum opinion states that the court did so.[3] Second, the Court of Appeals could

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[2]Furthermore, respondent did not rely only on *Matter of Balter* in her brief to the Court of Appeals in urging the irrelevance of petitioner's challenge to her order. To the contrary, she cited and quoted from various other cases, such as *Daly* v. *Amberg*, 126 N.Y. 490, 494-496, 27 N.E. 1038 (1891), and *Ketchum* v. *Edwards*, 153 N.Y. 534, 538-539, 47 N.E. 918 (1897), embracing the collateral bar rule. *See* Respondent's Brief to the Court of Appeals at 16-17.

[3]In a strikingly disingenuous attempt to support her claim that the Court of Appeals rejected petitioner's challenge on the merits, respondent cites (Respondent's Brief at 8) the court's statement in the final, one-

(continued...)

not have rejected petitioner's challenge on the merits without committing an egregious violation of basic New York law. In response to petitioner's verified petition in the Appellate Division alleging, *inter alia*, that respondent's order was an arbitrary and capricious one issued to vindicate her injudicious rancor, respondent did not file an answer admitting or denying the factual allegations which petitioner made in support of his claim. Rather, respondent moved to dismiss the petition pursuant to §§ 3211(a)(7) and 7804(f) of New York's Civil Practice Law and Rules on the ground that it failed to state a cause of action. Accordingly, the Appellate Division and the Court of Appeals were required to assume the verity of the factual allegations of the petition. *See, e.g., Stukuls* v. *State of New York*, 42 N.Y.2d 272, 275, 397 N.Y.S.2d 740, 742, 366 N.E.2d 829, 831 (1977). Indeed, petitioner made this exact point in his Petition (Petition for a Writ of Certiorari at 9-10). Respondent wholly ignores this crucial point because she cannot answer it.

Thus, although the Appellate Division and the Court of Appeals could and did conclude that petitioner's allegations were irrelevant, neither court could have concluded that they were meritless. Not surprisingly, neither court's opinion contains any language even remotely suggesting that the truth of petitioner's allegations did not have to be assumed. And needless to say, respondent's submission to this Court fails to explain how either court

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[3](...continued)
sentence paragraph of its opinion that it found "without merit" petitioner's "arguments that his due process rights were violated and that the mandate was defective...." App. 2. However, as respondent well knows, the due process arguments thus referred to were ones raised in Points II and III of petitioner's brief to the Court of Appeals. Those arguments, which are not pressed before this Court, have nothing at all to do with petitioner's challenge to the validity of respondent's order, a challenge which the Court of Appeals disposed of in the penultimate paragraph of its opinion.

could have at once accepted petitioner's factual allegations that her order was an invalid effort to indulge a purely personal grudge and nonetheless have concluded that the order was proper.

As is evident then, the Court of Appeals did rely on the collateral bar rule. In the face of that, respondent raises a most curious rejoinder. Citing *United States* v. *Ryan*, 402 U.S. 530, 532-533 (1971), and other authorities, she posits another reason, in addition to that proffered by petitioner in this litigation, why the Court of Appeals should not have followed the rule: petitioner had no "opportunity for effective review of the order before it was violated." Respondent's Brief at 9. But the existence of another basis to fault the Court of Appeals does not change the fact that the legitimate attack actually raised before and rejected by that court is directly at issue here. That is, petitioner cannot somehow lose his right to vindication on the presented ground because he could have presented a second valid challenge too.[4]

Finally, respondent frivolously suggests (Repondent's Brief at 7-8 n.5) that the Court of Appeals may not have "explore[d]" petitioner's constitutional challenge to the validity of her order because the verified petition "did not directly challenge the constitutional validity" of the order. In the verified petition (App. 21, 23) and in, for example, his brief to the Court of Appeals (*see* Petitioner's Brief to the Court of Appeals at 21, 24, 27), petitioner unequivocally alleged that respondent's order was "arbitrary and capricious." By doing so, petitioner left no doubt that he was raising a due process challenge to respondent's order. *See*,

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[4]Respondent's rejoinder is all the more curious since it represents a complete about-face. Respondent never conceded below that for this reason petitioner's challenge to the validity of her order was proper. To the contrary, as noted above, she argued broadly that petitioner could not challenge the validity of her order.

e.g., *Health Ins. Ass'n* v. *Harnett*, 44 N.Y.2d 302, 309, 405 N.Y.S.2d 634, 638, 376 N.E.2d 1280, 1284 (1978) ("the test for determing whether due process has been accorded may be said to be constant -- i.e., whether there has been protection of the individual against arbitrary action").

In sum, the Court of Appeals did deem irrelevant petitioner's challenge to the validity of respondent's order, and thus the court countenanced a violation of petitioner's due process right "to be free of clearly improper exercises of judicial authority." *Matter of Providence Journal Co.*, 820 F.2d 1342, 1347 (1st Cir. 1986), *modified*, 820 F.2d 1354 (1987) (en banc), *cert. dismissed sub nom. United States* v. *Providence Journal Co.*, 485 U.S. 693 (1988). This Court can and should grant certiorari to resolve the important issues presented concerning the power of judges to enforce decrees without their validity being subject to review.

B

Respondent is equally unpersuasive in opposing petitioner's argument that certiorari should also be granted because the Court of Appeals flouted this court's precedents on the due process right to an impartial tribunal. It is just preposterous that respondent asserts the absence of any basis in the record for petitioner's claim that she held him in contempt because of an abiding personal antipathy toward him and the office he represents. In the verified petition, petitioner supported that claim with an array of extraordinary and specific allegations of fact.[5] As noted above, respondent's motion to dismiss for failure to state a cause of action required that the verity of those factual allegations be assumed. Although the Court of Appeals erred badly in viewing petitioner's claim as irrelevant, it certainly neither

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[5]Petitioner's factual allegations are summarized at pp. 5-9 of the Petition for a Writ of Certiorari.

rejected his factual allegations nor concluded that they had somehow vanished from the record.

Respondent attempts to support her position that petitioner's claim is without support in the record by focusing only on the transcript of the proceeding which resulted in the contempt citation. Because, of course, respondent does not admit or otherwise conclusively establish her bias during this proceeding, she now concludes that the record "makes it clear that the contempt was not based on personal embroilment by respondent Justice with petitioner." Respondent's Brief at 13. But respondent does not and cannot explain why the record of this lawsuit does not also include petitioner's factual allegations that show her abiding personal animus, and instead contains only what she is able to view as favorable to her position.

Relatedly, respondent distinguishes petitioner's precedents on the ground that these decisions by this Court all "involve instances where the record established that the judge had become personally embroiled with the petitioner *during the conflict in issue*." Respondent's Brief at 11 (emphasis added). But if the due process right to an impartial tribunal is viewed so stingily, gross abuses of the judicial contempt power must go unremedied. A simple hypothetical will illustrate. Suppose a judge, like the judge in *Offutt* v. *United States*, 348 U.S. 11 (1954), repeatedly demonstrates an injudicious personal animosity toward an attorney during the course of a trial. Once the trial is over, the judge could act on that antipathy and hold the attorney in contempt on some pretext or the other the very next time he appears. On respondent's view, should the attorney then seek to vindicate his right to an impartial tribunal, the reviewing court could consider only the proceedings on the day of the contempt finding. However meritorious the attorney's claim, however indisputably the trial record demonstrates the judge's bias, the contempt finding must be sustained unless, *mirabile dictu*, the transcript of the

particular proceeding reflecting the contempt citation is alone sufficient to show the judge's rancor.

Next, respondent argues that petitioner was in fact guilty of contempt. Respondent's Brief at 10-11. But just as persons charged with conventional crimes enjoy fundamental constitutional rights regardless of their factual guilt, petitioner's right to an impartial tribunal cannot be made to depend on whether he was guilty of contempt. As Justice Frankfurter wrote in *Offutt* v. *United States*, 348 U.S. at 17, "[t]he question with which we are concerned is not the reprehensibility of [the contemnor's] conduct."[6] Similarly beside the point is respondent's contention that she found petitioner in contempt "as an immediate corrective step to restore order and maintain the dignity and authority of the court ...." Respondent's Brief at 13. After all, this contention assumes the falsity of petitioner's allegation that respondent acted not to further a public purpose but to gratify her injudicious personal animosity, and that assumption is improper.

In sum, the procedural posture of this case is and always has been that the truth of petitioner's factual allegations must be assumed. And those allegations

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[6]Respondent's characterizations of petitioner's conduct as "insolent[]" and "generally offensive" (Respondent's Brief at 10, 11) (internal quotations omitted) are all the more irrelevant since the Court of Appeals upheld the contempt finding only on the ground that petitioner "willfully refused to exit the well area after an explicit and unambiguous judicial order to do so ([New York] Judiciary Law § 750[A][3],[4])." App. 2. Thus the court did not address petitioner's arguments that the contempt finding could not be upheld under New York Judiciary Law § 750(A)(1), proscribing "[d]isorderly, contemptuous, or insolent behavior ... directly tending to interrupt [a court's] proceedings, or to impair the respect due to its authority." Notably, moreover, in his dissenting opinion in the Appellate Division, Justice Sullivan observed that there was "no evidence in this record that [petitioner] acted in a contumacious or insolent manner." App. 16.

essentially are that respondent "picked a quarrel with this lawyer and used [her] high position to wreak vengeance on him." *Fisher* v. *Pace*, 336 U.S. 155, 166 (1949) (Douglas, J., dissenting). By ignoring petitioner's allegations, the Court of Appeals flouted this Court's precedents on the due process right to an impartial tribunal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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